86-455
NO.

Supreme Court, U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. MASY, MICHAEL SANOK, RALPH N. FRANCAVILLA, ROBERT LYONS, JOSEPH M. PINTO and TOM ALCAMO,

*Petitioners,*

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 604 and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 748

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARTHUR M. SHARA
*Counsel for Petitioners*
2810 Morris Avenue
Union, New Jersey 07083
(201) 688-6464

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

## Questions Presented

Whether "blue collar" seniority can be enforced under the Fifth Amendment and Fourteenth Amendment equally as a white collar tenure.

a. does 45 U.S.C. 588 mandate that all railway workers are kept on one seniority roster as to craft?

b. Does 45 U.S.C. 547 give concurrent jurisdiction to railway workers in the United States District Court in spite of 45 U.S.C. 1105.

c. Didn't Congress mandate that Railway workers have the same prerogatives as other workers on DFR cases?

**Statement required by Rule 28.1**

Petitioner John R. Masy, Michael Sanok, Ralph N. Francavilla, Robert Lyons, Joseph M. Pinto and Tom Alcamo are individually New Jersey residents, members of the respondent Locals, hold seniority higher than the workers on the "ET" roster who are members of the same locals.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Question Presented | i |
| Statement Required by Rule 28.1 | ii |
| Table of Authorities | iv |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statutes and Constitutional Provisions | 2 |
| Statement of the Case | 10 |
| The Inconsistences with Sisco | 15 |
| Reasons for Granting the Writ | 16 |
| Conclusion | 16 |

APPENDIX:

| | |
|---|---|
| A—Opinion of the United States District Courtof Appeals for the Third Circuit | 1a |
| B—Judgment of the United States Court of Appeals | 14a |
| C—Order of the United States Court of Appeals Denying Petition for Rehearing | 16a |
| D—Order of the United States District Court for Summary Judgment | 18a |
| E—Opinion of the United States District Court | 20a |

PAGE

## Table of Authorities

### Cases Cited

Board of Regents v. Roth, 405 U.S. 564 (1974) ..... 15

Brown v. Hotel & Restaurant Employees Local 54, 104 S. Ct. 3179 (1984) .....14, 15

Czosek v. O'Mara, 397 U.S. 25 (1970) ..... 15

Firefighters Local Union No. 1784 v. Stoltts, 104 S. Ct. 2576 (1984) ..... 14

Grace & Co. v. Local Union 759, International Union of the Unitd Rubber, Cork, Linoleum & Plastic Workers of America, 103 S. Ct. 2177 (1983) ..... 15

Potomac Passengers Ass'n v. Chesapeake & O. Ry Co., 475 F.2d 325, 154 U.S. App. D.C. 214, on remand 363 F. Supp. 39 (1973) ..... 14

Pulman-Standard v. Swint, 72 L. Ed. 66, 456 U.S. 273 (1982) ..... 14

Railway Labor Executives' Ass'n. v. Southeastern Pennsylvania Transportation Authority, 534 F. Supp. 832, cert. denied 102 S. Ct. 2271, 456 U.S. 990 (Sp. Ct. R.R.A. 1982) .....12, 14

Slocum v. Delaware Lackawanna R.R. Co., 339 U.S. 329 (1949) ..... 16

Sure-Tan Inc. v. NLRB, 81 L. Ed. 483, 104 S. Ct. 2576 (1984) .....14, 15

Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1069 (1981) ..... 14

PAGE

## United States Constitution Cited

Fifth Amendment ..... 2, 14

Fourteenth Amendment ..... 2, 15

## Statutes Cited

P.L. 35 § 414-4, Legislative History, Amtrack Improve Act, 1981 ..... 10, 11

29 U.S.C. §185 ..... 8, 14

45 U.S.C. § 547 ..... i, 2, 14, 16

45 U.S.C. § 588 ..... i, 3, 13

45 U.S.C. § 588(b) ..... 11

45 U.S.C. § 588(d) ..... 12

45 U.S.C. § 588(7) ..... 12, 15

45 U.S.C. § 719 ..... 5

45 U.S.C. § 1105 ..... i, 6, 14

**NO.**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. MASY, MICHAEL SANOK, RALPH N. FRANCAVILLA, ROBERT LYONS, JOSEPH M. PINTO and TOM ALCAMO,

*Petitioners,*

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 604 and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 748

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

### Opinions Below

The opinion of the Third Circuit, (Appendix to Petition for Certiorari, Appendix 1a) is unreported. The opinion of the Third Circuit *en banc* (Appendix 16a) is unreported. The District Court's opinion is unreported (Appendix 20a).

## Jurisdiction

The opinion of the Third Circuit Court of Appeals was entered on May 2, 1986 and the Petition for Rehearing was denied on May 27th, 1986. This Court's Jurisdiction is invoked under 28 U.S.C. 1254 (1) and (3).

## Statutes and Constitutional Provisions

The United States Constitution Fifth Amendment says in part:

> "* * * nor shall private property be taken for public use, without just compensation."

and

> "* * * nor be deprived of life, liberty, or property, without due process of law; * * *"

and the Fourteenth Amendment:

> ". . . The priveleges and immunities of the citizens of these United States shall not be abridged by law, and that a person shall not be deprived of life liberty or property with due process of law, nor be denied equal protection of the laws . . ."

**Statutes (45 U.S.C.):**

> § *547. Jurisdiction of the district courts of the United States to impose sanctions*
>
> (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this

chapter, obstructs or interfers with any activities authorized by this chapter, refused, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct or threat.

(b) Nothing contained in this section shall be construed as relieving any person or any punishment, liability, or sanction which may be imposed otherwise than under this chapter.

§ 588. *Transfer of employees*

(*a*) *Implementing agreement with Conrail, etc.*

Not later than May 1, 1982, Conrail, commuter authorities that intend to operate commuter service, and representatives of the various craft or classes of employees of Conrail to be transferred to commuter authorities shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

(*b*) *Negotiations for implementing agreement*

Not later than May 1, 1982, Conrail, Amtrak Com-

muter, and representatives of the various crafts or classes of employees of Conrail to be transferred to Amtrak Commuter shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

(c) *Scope of negotiations for implementing agreement*

Such negotiations shall—

(1) determine the number of employees to be transferred to Amtrak Commuter or a commuter authority;

(2) identify the specific employees of Conrail to whom Amtrac Commuter or a commuter authority offers employment;

(3) determine the procedure by which such employees may elect to accept employment with Amtrak Commuter or a commuter authority;

(4) determine the procedure for acceptance of such employees into employment with Amtrak Commuter or a commuter authority;

(5) determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights;

(6) ensure that all such employees are transferred to Amtrak Commuter or a commuter authority no later than January 1, 1983; and

(7) ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority in order to (A) provide employees transferred to Amtrak Commuter or a commuter authority at least one opportunity every six-month period to exercise previous freight seniority rights, (B) maximize employment opportunities for employees on furlough, (C) maintain the ability to recall experienced employees, (D) ensure that under no circumstances are seniority rights exercised in any manner which results in any disruption of service or a position being filled which would otherwise not be filled under the terms of any crew consist, fireman manning, or other similar agreement, and (E) ensure that Conrail has the right to furlough one employee in the same craft or class for each employee who returns from Amtrak Commuter or a commuter authority by exercising seniority.

* * *

§ *719. Judicial review*

(*a*) *General*

Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 718 of this title, it may be reviewed with respect

to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties.

• • •

§ *1105. Judicial review*

(*a*) *Special court: exclusive jurisdiction for civil actions*

Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this chapter, or administrative action taken thereunder to the extent such action is subject to judicial review;

(2) challeging the constitutionality of any provision of or amendment made by this chapter;

(3) to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this chapter, or

(4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this chapter.

(*b*) *Exclusive review by writ of certiorari to the Supreme Court*

A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this chapter shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

* * *

*References in Text.* "This chapter", referred to in text, was in the original "this subtitle", meaning subtitle E of Pub.L. 97-35, Title XI, §§ 1131 to 1169, Aug. 13, 1981, 95 Stat. 643 to 687, cited as the "Northeast Rail Service Act of 1981", and which, in addition to enactment this chapter, made substantial amendments to Title 45. For complete distribution of such subtitle to this Code, see Tables volume and Short Title note set out under section 1101 of this title.

*Effective Date.* Section effective Aug. 13, 1981, see section 1169 of Pub.L. 97-35, set out as a note under section 1101 of this title.

*Legislative History.* For legislative history and purpose of Pub.L. 97-35, see 1981 U.S. Code Cong. and Adm. News, p. 396.

*West Federal Forms*

Enforcement and review of decisions and orders of administrative agencies, see § 851 et seq.
Supreme Court—

Jurisdiction on appeal, see § 121 et seq.

Jurisdiction on writ of certiorari, see § 221 et seq.

---

*Notes of Decisions*

*Decision of arbitrator 1*

*Jurisdiction 2*

---

*1. Decision of arbitrator*

In order to overturn decision of arbitrartor under this chapter, there must be showing either that arbitrator failed to comply with requirements, under this chapter, failed to act within his jurisdiction, or acted corruptly. New Jersey Transit Rail Operations, Inc. v. International Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Sp.Ct.R.R.R.A. 1982, 550 F.Supp. 1327.

**Statute (29 U.S.C.):**

§ *185. Suit by and against labor organizations*

*Venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

*Respondsibility for acts of agent; entity for purposes of suit; enforcement of money judgments*

(b) Any labor organazation which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

*Jurisdiction*

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

* * *

## Statement of Case

This was an action brought by employees against their employer and their respective locals and the parent organization asserting violations of the Statutes, the implementing agreement, the collective bargaining agreement and the Constitution, under which NJTRO took over the operation of certain New Jersey commuter rail lines from the Consolidated Rail Corporation (Conrail) The Third Circuit affirmed the District Court's dismissal of the employees claim against NJTRO on jurisdictional grounds and the granting of summary judgment to the Unions.

Plaintiffs working for Conrail were given an exclusive remedy (see Legislative History P.L. 35 Section 414-4 Amtrack Improve Act 1981).

*Section 414-4—Selection of employees*

> This section is the first of the provisions that would take effect only in the absence of an agreement by the parties. The section would accomplish two major objectives. First, it would provide a method for determining the number of new positions on the acquiring railroad that would be filled from the ranks of former Conrail employees ("transferred employees") and the number of positions that could be filled from the acquiring railroad's previous rosters. In general, Conrail employees would be given first bid on new positions. However, if acquisition of a line from Conrail occasions the abolishment of a position due to coordination or consolidation of service, the acquiring railroad employee affected by the transaction would have first bid on any new position the acceptance of which would not require a change in residence.

> Second, in selecting Conrail employees for new positions the acquiring railroad would be required to respect class and craft distinctions common in the industry and to favor persons senior in service over those with less time in service.
>
> Third, the section would provide a method for selecting Conrail employees on a geographic basis. If an insuficient number of Conrail employees are available on the transferred line segment, other employees available to accept positions without change of residence would receive offers. If additional personnel were re- * * *
>
> * * *

Appellants were previosuly employed by different railroads traversing New Jersey, i.e. Jersey Central, Erie Lackawanna, and Pennsylvania R.R. When Congress authorized Conrail to provide a commuter service, Conrail took over all commuter services of all Railroads in 1976. At that event, all employees were dovetailed onto one roster by trade. For example, plaintiff Michael Sanok ranked sixth on the electrician roster when defendant New Jersey Transit Rail Operations (NJTRO) took over Conrail's employees. Plaintiff Lyons was ninth, et cet. (Ex. 15). All plaintiffs have had continuous employment.

Congress then determined that Conrail divest itself of commuter services; and turn operations over to State Authority, no later than May 1, 1982. Congress further mandated that all commuter authorities enter into negotiations with the respective Railroad Unions for an Implementing Agreement (45 U.S.C. § 588 (b)).

Congress limited the scope of that agreement to ensure

the seniority of the former Conrail employees (45 U.S.C. § 588 (7)):

> "ensure the retention of prior seniority on Conrail of employees transferring to Amtrack Commuter or a commuter authority . . ."

See *Railway Labor Executives' Ass'n.* v. *Southeastern Pennsylvania Transportation Authority,* 534 F. Supp. 832, cert. denied 102 S. Ct. 2271, 456 U.S. 990 (Sp. Ct. R.R.A. 1982).

The defendant Unions (IBEW) and defendant NJTRO were unable to reach an agreement. The issues were submitted to an impartial arbitrator (45 U.S.C. § 588 (d)) whose decision would be binding on all parties. The arbitrator, Richard Kasher, entered an award in full compliance with the statute, preserving the seniority rights of the plaintiffs. The arbitrator's Award became the Enabling Agreement (Ex. 36-45). Both defendants signed the Award, neither party appealed.

The agreement provided, as far as this law suit is concerned:

> "3-B-1 the N.J. Transit Rail operating territory shall consist of a single seniority district for the electrician craft." (Ex. 79 and 123).

Subsequently, the N.J.T.R.O. set-up a Second Electrical Roster with newly hired employees (Ex. 13). The defendant I.B.E.W. entered into a contract with NJTRO on behalf of the newly hired electrical employees, in spite of their duties due to the plaintiffs herein. These new employees were assigned to the same locals as the plaintiffs. The defendant Union IBEW breached its won policy

(Ex. 159) and breached its duty to the plaintiffs, as well as breaching the Enabling Agreement and the Statute which gave birth to it. The defendants have impaired the vested, statutory rights of the plaintiffs. 45 U.S.C. § 588.

Plaintiffs thereafter filed grievances both with their employer and their Union, defendant IBEW (Ex. 160) during the week of October 13, 1983. Their employer admits receiving grievances (24, para 21) and then alleged it "lost" their grievances. Their Union, a defendant in this case did nothing but vacillate through a conflict situation although it had a clear duty as well as its' own policy (Ex. 159 and 165-170).

When plaintiffs realized they were getting a "run around" they sought legal advise and were advised that their case was subject to Section 301 of the Labor Management Act which provides a six month statute of limitations on a DFR case. That statute is inapplicable here, since suit was timely filed in the United States District Court; District of New Jersey on February 7th, 1985.*

Motion practice led to delays. The District Court refused to certify the dismissal of N.J.T.R.O. (Pa175).

Plaintiffs tried to keep their case simple; i.e., a breach of their stautory rights under the Enabling Agreement.

This Court has held that plaintiffs were not obligated to exhaust their administrative remedies in a DFR case.

Nor is there in this case a minor dispute since both the statutory rights and rights under the Enabling Agreement and the Constitution which gave the plaintiffs-appellants that which Congress mandated in 45 U.S.C. § 588.

---

* This case differs from Sisco in that regard.

This Court has two additional questions to determine:

1. Did the District Court have jurisdiction to hear this case and to enforce a DFR suit where both the Labor Management Act and the Railway Labor Act use the same verbage on the issue; 29 U.S.C. § 185. See comprehensive elvaluation in *Railway Labor Executives Association* v. *South Eastern Pennsylvania Transportation Authority,* 534 F.S. 832 (1982).

2. Did Congress infer that the District Court could hear this case by reason of 45 U.S.C. § 547? *Potomac Passengers Ass'n* v. *Chesapeake & O. Ry Co.,* 475 F.2d 325, 154 U.S. App. D.C. 214, on remand 363 F. Supp. 39 (1973).

There is no reason for this Court to pause to consider the exclusivity of 45 U.S.C. § 1105. It is plaintiffs' argument that no complex railroad case presents itself herein. It is also evident that this Court, not the Special Railroad Court, has the jurisdiction to evaluate statutory interpretation and legislative policy and constitutional issues. It is well apparent that Congress gave railway workers two bites of the apple. This Court has repeatedly sustained seniority even in face of attacks on affirmative action and EEOC cases. See *Texas Department of Community Affairs* v. *Burdine,* 101 S. Ct. 1069 (1981) by Vern E. Hauk 33 Lab. L.J. 434-441, July 1982; *Pulman-Standard* v. *Swint,* 72 L. Ed. 66, 456 U.S. 273 (1982) by Thomas R. Bagby 33 Lab. L.J. 409-416, July 1982; *Firefighters Local Union No. 1784* v. *Stoltts,* 104 S. Ct. 2576 (1984); *Sure-Tan Inc.* v. *NLRB,* 81 L. Ed. 483, 104 S. Ct. 2576 (1984); *Brown* v. *Hotel & Restaurant Employees Local 54,* 104 S. Ct. 3179 (1984) by Henry P. Baer 192 N.Y.L.J. p. 1, col. 1, Sep-

tember 1984; *Grace & Co.* v. *Local Union 759, International Union of the United Rubber, Cork Linoleum & Plastic Workers of America,* 103 S. Ct. 2177 (1983); *Sure-Tan Inc.* v. *NLRB,* 104 S. Ct. 2803 (1984); *Brown* v. *Hotel & Restaurant Employees Local 54,* 104 S. Ct. 3179 (1984) by Henry P. Baer 192 N.Y.L.J. p. 1, col. 1, September 1984.

This Court has never determined whether a blue collor worker has a property interest in his seniority protected by the Fifth Amendment prohibiting against the taking of property without just compensation and the Fourteenth Amendment guarantees due process and equal protection.

See *Board of Regents* v. *Roth,* 405 U.S. 564 (1974).

**The Inconsistancies with Sisco**

The *Sisco* case was barred by the Statute of Limitations, which can't be applied in this case. The *Sisco* case did not consider that senority was a property right secured by the Constitution. The *Sisco* court did consider the failure to exhaust administrative remedies; but did not apply it sub judice on the DFR case.

The *Sisco* court laid out three criteria, all three were applicable sub judice, *Czosek* v. *O'Mara,* 397 U.S. 25 (1970). Here, the employer and the employee refused to activate grievance machinery after plaintiffs filed their grievances.

The Court of Appeals also erred in indicating that the work rules permitted the two rosters when Congress in creating Conrail obviated all other rosters and dovetailed all workers by craft. See 5 U.S.C. § 588 (7).

Note further that the NRAB only deals with interpretations of agreements involving rates of pay, working conditions, but not the right to disturb a man's seniority. *Slocum* v. *Delaware Lackawanna R.R. Co.,* 339 U.S. 329, 240 (1949).

**Reasons for Granting the Writ**

Firstly, this Court has not specifically held that job security, seniority, has the same property rights as tenure.

Secondly, the Court below committed error in distinguishing this case with *Sisco,* the criteria were met in all categories.

Thirdly, this Court has not determined whether Congress gave Railway Workers an alternate remedy under 45 U.S.C. § 547.

## CONCLUSION

**This Court should enter an order merging the rosters.**

**This matter should be remanded to the District Court, to enable Counsel to establish Plaintiff's damages and enable Counsel for Plaintiffs to submit an affidavit of services.**

**This Court should create a Ruling equating seniority with tenure.**

Respectfully submitted,

ARTHUR M. SHARA
*Counsel for Petitioners*
By: ARTHUR M. SHARA

## APPENDIX A

**Opinion of the United States Court of Appeals for the Third Circuit**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 85-5604

---

JOHN R. MASY, MICHAEL SANOK, RALPH N. FRANCAVILLA, ROBERT LYONS, JOSEPH M. PINTO, and TOM ALCAMO,

Appellants

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 604, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 748

(D.C. Civil No. 84-0521)

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

---

Submitted Under Third Circuit Rule 12(6)
April 17, 1986

Before: ADAMS, GIBBONS, and STAPLETON,
*Circuit Judges*

(Opinion Filed: May 2, 1986)

---

*Appendix A*

ARTHUR M. SHARA, ESQ.
2810 Morris Avenue
Union, New Jersey 07083

Attorneys for Appellants

MICHAEL S. WOLLY, ESQ.
GREGORY K. McGILLIVARY, ESQ.
MULHOLLAND & HICKEY
1125 - 15th Street, N.W.
Suite 400
Washington, DC. 20005

Attorneys for Appellee Unions

IRWIN I. KIMMELMAN
Attorney General of New Jersey

Of Counsel
JAMES J. CIANCIA
Assistant Attorney General

On the Brief
ROBERT H. STOLOFF
Deputy Attorney General
McCarter Highway & Market Street
P. O. Box 10009
Newark, New Jersey 07101

Attorneys for Appellee,

New Jersey Transit Operations, Inc.

*Appendix A*

## OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

This is an action brought by employees against their employer, New Jersey Transit Operations, Inc. (NJT), alleging a violation of an implementing agreement and a collective bargaining agreement under which NJT took over the operation of certain New Jersey commuter rail lines from the Consolidated Rail Corporation (Conrail) and their union, International Brotherhood of Electrical Workers and Local 604 and 748 (Union), for allegedly breaching its duty of fair representation. The district court dismissed the employees' claim against NJT on jurisdictional grounds and granted summary judgment in favor of the Union. We affirm.

Plaintiffs are electricians employed by NJT and members of the Union, which is the exclusive collective bargaining representative for NJT employees in the electricians' craft. The plaintiffs formerly worked for Conrail and two of Conrail's predecessor railroads: the Erie Railroad, and the Central Railroad of New Jersey. On January 1, 1983, the plaintiffs became employees of NJT when NJT took over certain commuter rail operations from Conrail pursuant to the Northeast Rail Service Act of 1981, 45 U.S.C. §§ 1101-1116 (1982). To accomplish this takeover, NJT entered into an implementation agreement with Conrail and the Union, as required by section 508 of the Rail Passenger Service Act, 45 U.S.C. § 588 (1982). The implementing agreement provided that former Conrail employees would retain seniority reflective of the dates of their earliest employment with either Conrail or one of its predecessor railroads. The Rail Passenger Service Act

also required that once an implementing agreement was established, NJT and the Union were to negotiate new collective bargaining agreements. *See* 45 U.S.C. § 590 (1982). Following the imposition of the implementing agreement, NJT and the Union negotiated and agreed upon two collective bargaining contracts -- one covering electricians in the Maintenance of Equipment Department and one for electricians in the Electric Traction Department. These agreements provide for seniority by department.

The distinction between these two departments, both of which employ electricians, arises out of an historical practice. Because the Lackawanna Railroad, another predecessor of Conrail, was electrified, it had separated the work of maintaining and repairing its electrical power lines and substation (referred to as electric traction work) from the electrical maintenance and repair work on locomotives and passenger railroads (referred to as maintenance of equipment work). Electricians employed within the Electric Traction Department were also responsible for maintaining and repairing the electrical work at stations, bridges, and buildings. (This work is referred to as maintenance of facilities.) The Erie and Central New Jersey, by contrast, were not electrified and therefore electricians were separated by geographic locations, not job functions. Accordingly, while Lackawanna electricians were limited in their job function, some Erie and Central New Jersey electricians performed both equipment and facility repair work. These distinctions continued after Erie merged with Lackawanna in 1960 and after Conrail assumed operational control of both the Erie-Lackawanna and Central New Jersey in 1976.

When NJT took over Conrail's operations, it continued to separate the maintenance of equipment function from the electric traction function. NJT,

therefore, created two departments: Maintenance of Equipment and Electric Traction. In addition to the responsibility for the maintenance of electric traction, the Electric Traction Department was given primary responsibility for the maintenance of facilities. Hence, when NJT and the Union negotiated new collective bargaining contracts, they created separate agreements for each department. During negotiations over the agreements, it was discovered that eight electricians in the Maintenance of Equipment Department were performing the maintenance of facilities work they had historically done on the Erie and Central New Jersey lines. The plaintiffs are among these eight electricians. NJT and the Union were unable satisfactorily to agree on the status of these employees and are still in the process of resolving this issue. In the meantime, however, the electricians assigned to the Maintenance of Equipment Department, but performing the maintenance of facilities tasks they have historically done, have been kept on the Maintenance of Equipment seniority list. Apparently, since NJT's takeover more maintenance of facilities work has been generated and that work has been assigned to the Electric Traction Department. As a result, although the plaintiffs have continued to do the work they historically performed, electricians in the Electric Traction Department have had more overtime assignments per employee than plaintiffs have had. Moreover, because seniority is based on department time electricians in the Electric Traction Department who have less company seniority than plaintiffs would be senior to plaintiffs if plaintiffs transferred to the Electric Traction Department.

Believing that ...eir seniority rights were being violated, plaintiffs filed grievances with both the Union and NJT. The plaintiffs allege, and we accept as true in the context of this summary judgment proceed ng.

that neither the Union nor NJT acted on those grievances. Plaintiffs, therefore, brought this suit charging NJT with a breach of contract and the Union with two breaches of its duty of fair representation.

I.

Jurisdiction

As best we can make it out, the plaintiffs' complaint alleges that both the implementing agreement and the collective bargaining agreement covering electricians in the Maintenance of Equipment Department require seniority by craft. Therefore, plaintiffs claim that NJT breached these agreements by creating a separate seniority roster for electricians in the Electric Traction Department. The district court, however, never reached the merits of this claim because it found that the dispute was within the exclusive jurisdiction of the National Rail Adjustment Board (NRAB) and that plaintiffs' action against NJT lay with that administrative body. *Masy v. New Jersey Transit Rail Operations, Inc.*, No. 84-521, slip op. at 3 (D.N.J. Sept. 7, 1984).

The plaintiffs argue that section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1982), provides the jurisdictional grant for their suit against NJT. The district court, however, correctly held that the LMRA expressly excludes employees and employers governed by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982), from its coverage. *See* 29 U.S.C. § 152(2), (3) (1982); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 376 (1969). Hence plaintiffs' federal claim against NJT must rely on the Railroad Labor Act.

Section 3 of the Railroad Labor Act provides for the administrative adjudication by the NRAB of minor disputes between employees and a railroad that grow out of grievances or an interpretation of a collective

bargaining agreement. 45 U.S.C. § 153 First (i) (1982). In most cases, the administrative procedures provided by the Railroad Labor Act are considered the exclusive procedures available to employees who have minor disputes with a railroad. *See Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320, 322 (1972). There are, however, three exceptions to the exclusive jurisdiction of the NRAB: "(1) when the employer repudiates the private grievance machinery; (2) when resort to administrative remedies would be futile; and (3) when the employer is joined in a [duty of fair representation] claim against the union." *Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1190 (3d Cir. 1984). The plaintiffs' seniority dispute with NJT involves an interpretation of the collective bargaining agreements, as well as an interpretation of the implementing agreement, and is a minor dispute governed by section 3 of the Railroad Labor Act. *See id.*; *International Association of Machinists & Aerospace Workers v. Northwest Airlines, Inc.*, 673 F.2d 700, 705 (3d Cir. 1982). Therefore, unless one of the exceptions to the NRAB's exclusive jurisdiction applies, the plaintiffs' claim against NJT must be dismissed.

The employees contend that their claim falls within the first exception because they filed grievances with both the Union and NJT and neither the Union nor NJT acted on those grievances. The district court found no merit in this argument, concluding that "the complaint alleges that the grievance procedure was never properly invoked." *Masy*, No. 84-521, slip op. at 3. It appears that the district court was referring to paragraph 11 of the complaint in which the employees allege that the Union never filed their grievances with NJT. *See* Joint Appendix at 6. In paragraph 12 of the complaint, however, plaintiffs allege that following the inaction by the Union, the employees on their own filed

grievances with NJT. *Id.* The collective bargaining agreement between NJT and the electricians in the Maintenance of Equipment Department provides, "A claim or grievance must be presented in writing by an employee or on his behalf by a union representative, to the employee's General Foreman or other designated officials . . . ." Joint Appendix at 93. Thus on the record before us it appears that the grievances were properly filed. However, even if we assume that the grievances were properly filed and NJT took no action on them, these facts are insufficient to support jurisdiction under the grievance repudiation exception.

The Railroad Labor Act's administrative remedy is a statutory grievance procedure that can be invoked by the employee. 45 U.S.C. § 153 First (i) (1982). Because the employees have this alternative procedure available, the grievance-repudiation exception to the NRAB's exclusive jurisdiction is not triggered merely because there was a failure to grieve under the contract. Our decision in *Sisco* did not examine the grievance-repudiation exception, but the cases it cited in holding that such an exception exists involved situations in which resort to the contract-grievance procedure would be meaningless. *See Czosek v. O'Mara*, 397 U.S. 25, 29 (1970) (allegations that the employer participated in the union's allegedly discriminatory decision not to process employees' grievance) (dicta); *Glover v. St. Louis-San Francisco Railway*, 393 U.S. 324, 329-30 (1969) (allegations of racial discrimination on the part of both the employer and the union). For the exception to apply, the employee's claim against the railroad should involve an issue that does not directly relate to the interpretation of a collective bargaining agreement. *See Glover*, 393 U.S. at 329 (allegations of racial discrimination); *Goclowski v. Penn Central Transportation Co.*, 571

F.2d 747, 756-57 (3d Cir. 1977) (allegations of failure to ratify an agreement). *But cf. Raus v. Brotherhood Railway Carmen*, 663 F.2d 791, 798 (8th Cir. 1981). In the present case, plaintiffs' claim against NJT involves an interpretation of the implementing agreement and the collective bargaining agreements regarding seniority rights. NJT's alleged failure to grieve does not affect the nature of that claim as a contract interpretation action. Thus the grievance repudiation exception does not apply in this case.

The second exception to the NRAB's administrative procedures arises when resort to the NRAB would be futile. This exception does not apply here because employees have a right to institute such administrative proceedings and there is nothing in the record that would indicate that these administrative procedures would not provide the relief plaintiffs seek.

With respect to the third exception, we have explained that "an employer may be joined in a [breach of duty of fair representation] action against the union if facts are alleged tying the employer to the events complained of." *Sisco*, 732 F.2d at 1190. In their complaint plaintiffs allege that there was a "community of purpose" between the Union's alleged breach of its duty and NJT's participation in that breach. As the district court correctly reasoned, however, this conclusory allegation is insufficient to link NJT to the Union's alleged breach of its duty of fair representation. Although the alleged breach of duty by the Union and the alleged breach of contract by NJT arose out of the same event -- the negotiation of the second collective bargaining agreement covering electricians in the Electric Traction Department -- the claims against the Union and NJT are separate and distinct. *See Raus*, 663 F.2d at 798 (requiring collusion or some similar nexus between the union and the employer).

Finally, under the third exception this court has left open the question whether the employer may be joined to the breach of fair representation claim where no facts tie the employer to that claim but the employer's presence is necessary for complete relief. *See Sisco*, 732 F.2d at 1190-91. The plaintiffs in this appeal ask us to address this open question, arguing that they seek an order directing the merger of the two seniority lists and that the employer is a necessary party if that order is to be effective. To the extent that the presence of the employer is necessary for complete relief in the breach of the duty of fair representation claim against the union, the presence of the employer should not be a means of circumventing the NRAB's exclusive jurisdiction over minor contractual disputes. Thus, it may be appropriate to join an employer to a breach of duty of fair representation claim so that binding arbitration or some similar remedy may be ordered, but it would not be appropriate to extend that limited presence into a grant of jurisdiction allowing the district court to adjudicate the employees' minor contractual dispute with the employer. In the instant case it is not necessary to join NJT even for a limited purpose because, as will be discussed, the district court properly dismissed the breach of duty of fair representation claim on a motion for summary judgment.

II.

Duty of Fair Representation

The plaintiffs' complaint appears to assert that the Union committed two breaches of its duty of fair representation. First, the plaintiffs allege that the implementing agreement required seniority by craft and that the Union had violated that agreement by entering into two collective bargaining agreements that provided for seniority by department. Second, the

plaintiffs contend that the Union breached its duty of fair representation by not processing their grievances concerning the seniority dispute. These breaches of duty of fair representation claims are not subject to the exclusive jurisdiction of the NRAB. *Sisco*, 732 F.2d at 1191; *see also DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 (1983). The district court, therefore, considered the merits of plaintiffs' breach of duty of fair representation claims but granted summary judgment in favor of the Union. *See Masy v. New Jersey Transit Rail Operators, Inc.*, No. 84-521 (D.N.J. Aug. 20, 1985).

The duty of fair representation is a judicially-created rule designed to afford individual employees a certain degree of protection against discriminatory treatment by a union. *See Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202-03 (1944). The rule is a counterbalance to the union's position as exclusive bargaining representative. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Riley v. Letter Carriers Local No. 380*, 668 F.2d 224, 228 (3d Cir. 1981). However, because a union must attempt to satisfy the collective needs of a group of employees, a certain amount of discretion must be given to the union. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Therefore, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *see also Riley*, 668 F.2d at 228.

The plaintiffs' complaint contains no allegations that would support a finding of bad faith or arbitrary conduct. Although the plaintiffs make bare assertions of arbitrary conduct, they do not support these claims with actual factual allegations. The distinction between the Electric Traction and Maintenance of

Equipment departments is reasonable. The work historically has been segregated, and the decision to separate seniority by department is logical given this historic practice. That the Union agreed to leave certain electricians, including the plaintiffs, in a department that handles a different kind of work because of historical reasons cannot, on this record, be called arbitrary. *See Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1014-17 (3d Cir.) (holding that a collective bargaining agreement could make seniority distinction based on job function), *cert. denied*, 434 U.S. 837 (1977). Moreover, there is nothing to indicate that the Union has ignored the plaintiffs' grievances because of bad faith. The Union has submitted an affidavit stating that it has attempted, and is continuing to attempt, to negotiate a resolution of the assignment-to-department problem. *See* Joint Appendix at 32-34.

Conclusion

The district court did not err in dismissing the contract interpretation claim against NJT. Nor did the court err in granting summary judgment in favor of the Union on the breach of duty of fair representation claims. The proper forum for the employees' seniority dispute with NJT is the NRAB. Read generously, the plaintiffs' complaint may also state claims for violation of the Rail Passenger Service Act. The proper forum for those claims, however, is the Special Court for Regional Rail Reorganization set up by the Rail Passenger Service Act (as amended by the Northeast Rail Service Act of 1981), which has exclusive jurisdiction over such claims. *See* 45 U.S.C. § 1105(a) (1982). In fact the plaintiffs have filed a complaint with the Special Court. *See Masy v. New Jersey Rail Operations, Inc.*, No. 85-04 (Sp. Ct. R.R.R.A. filed Feb. 15, 1985). We, therefore, will affirm both judgments of the district court.

*Appendix A*

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX B

### Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**No. 85-5604**

JOHN R. MASY, MICHAEL SANOK, RALPH N. FRANCAVILLA, ROBERT LYONS, JOSEPH M. PINTO and TOM ALCAMO,

*Appellants,*

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 604 and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 748

(D.C. Civil No.84-0521)

On Appeal from the United States District Court
For the District of New Jersey

Present: Adams, Gibbons and Stapleton, *Circuit Judges.*

*Appendix B*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) April 17, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the final judgment of the said District Court, entered August 27, 1985, be, and the same is hereby affirmed. Cost taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

SALLY MRVOS

May 2, 1986

Costs taxed in favor of the appellee Unions as follows:

| | |
|---|---|
| Appendix | $ 58.10 |
| Brief | $ 50.88 |
| Total | $108.98 |

Certified as a true copy and issued
in lieu of a formal mandate on
June 6, 1986

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States
Court of Appeals, for the Third
Circuit

## APPENDIX C

**Order of the United States Court of Appeals Denying Petition for Rehearing**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**No. 85-5604**

JOHN R. MASY, MICHAEL SANOK, RALPH N. FRANCAVILLA, ROBERT LYONS, JOSEPH M. PINTO and TOM ALCAMO,

*Appellants,*

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC., INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 604 and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 748

(D.C. Civil No.84-0521)

SUR PETITION FOR REHEARING

Present:

Aldisert,*Chief Judge,* Seitz, Arams, Gibbons, Hunter Weis, Garth, Higginbotham, Sloviter, Becker, Stapleton and Mansmann, *Circuit Judges*

*Appendix C*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JOHN GIBBONS
Judge

Dated: May 27, 1986

## APPENDIX D

### Order of the United States District Court for Summary Judgment

UNITED STATES DISTRICT COURT
for the DISTRICT OF NEW JERSEY

Civil Action No. 84-521

JOHN R. MASY, et al.,

*Plaintiffs,*

—vs—

NEW JERSEY TRANSIT RAIL OPERATIONS, et al.,

*Defendants.*

This matter having come before the court on the motion of defendants International Brotherhood of Electrical Workers and I.B.E.W. Locals 604 and 748 for summary judgment, and on the cross-motion of plaintiffs for summary judgment, and the court having considered the submissions of the parties as well as the arguments made on May 20, 1985, and finding there to be no genuine issue of material fact in dispute,

It is on this 20th day of August, 1985 ORDERED that the cross-motion of plaintiffs be and is hereby DENIED and the motion of defendants be and is hereby GRANTED,

and summary judgment is hereby entered in favor of defendants International Brotherhood of Electrical Workers and locals 604 and 748, and against plaintiffs, in accordance with the opinion filed this date.

Hon. FREDERICK B. LACEY
United States District Judge

## APPENDIX E

### Opinion of the United States District Court

UNITED STATES DISTRICT COURT
for the DISTRICT OF NEW JERSEY

Civil Action No. 84-521

JOHN R. MASY, et al.,

*Plaintiffs,*

—vs—

NEW JERSEY TRANSIT RAIL OPERATIONS, et al.,

*Defendants.*

This matter comes before the courts on the motion of defendants International Brotherhood of Electrical Workers (IBEW or "the Union") and IBEW Locals 604 and 748 ("the Locals") for summary judgment, and on the cross-motion of plaintiffs for summary judgment against those defendants. Argument was entertained on May 20, 1985, at which time the court reserved decision pending plaintiffs' counsel's submission of the citation for a case mentioned at oral argument, but not previously submitted to the court. That citation having been provided, and the court having carefully reviewed the record, including the joint

counter-statement of facts submitted by plaintiffs, it finds there is no genuine issue as to anyfact material to the disposition of plaintiffs' claim against these defendants.

## BACKGROUND

Plaintiffs are employees of New Jersey Transit Rail Operations (NJTRO), are members of defendant Union and Locals, and are all citizens and residents of the State of New Jersey. In 1982-1983 NJTRO took control of some commuter rail lines previously operated by Conrail (not a party herein). To facilitate the takeover NJTRO entered into an implementation agreement with Conrail, and collective bargaining agreements with defendants IBEW and Locals 604 and 748. The complaint alleges that NJTRO breached the collective bargaining agreements with respect to the maintenance of seniority rosters, and that the Union and Locals failed to properly process and present the members' grievances on that issue. On September 7, 1984 the complaint was dismissed as to defendant NJTRO for, among other things, lack of subject matter jurisdiction, leaving for trial only the claim for breach of the duty of fair representation as against the Union and Locals.

## STANDARDS

To prevail on a duty of fair representation claim plaintiffs must establish two things; first, that there was a breach of the collective bargaining agreement, and second that the Union wrongfully refused to process a grievance with respect to that breach. The Union's actions must be

shown to be "arbitrary, discriminatory, or in bad faith". *Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967). To establish this second aspect, there must be "substantial evidence of fraud, deceitful action or dishonest conduct" to show the duty has been breached. *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 301 (1971). The Third Circuit requires plaintiff to show that the union acted with a bad faith motive. *Medlin* v. *Boeing Vertol Co.,* 620 F.2d 957, 961 (3d Cir. 1980); *Findley* v. *Jones Motor Freight, etc.,* 639 F.2d 953, 959 (3d Cir. 1981).

As noted by both the Supreme Court of the United States and this Circuit, a wide range of discretion must be afforded the unions to allow for the "differences [which] arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953); *DeBoles* v. *Trans World Airlines, Inc.,* 552 F.2d 1005, 1013-1017 (3d Cir.) *cert. denied,* 434 U.S. 837 (1977).

As to the claim that NJTRO breached the collective bargaining agreement, plaintiffs' theory focuses on their contention that the maintenance of two seniority rosters violates the implementing agreement. They assert that the implementing agreement—an interim measure imposed by arbitration and called for the statute—is unalterable. Neither the statute nor the case law supports this contention. It is clear that such interim agreements are subject to further negotiation. *American Railway Supervisors Ass'n* v. *SEPTA,* 551 F.Supp. 688, 691 (Spec. Ct. RRRA 1982). *See also* Rail Passenger Service Act, 45 U.S.C. §588 (1981). As noted by the Special Court for Railway Reorganization matters

*Appendix E*

> Sections 508 and 510 clearly delineate the matters which are to be resolved at each step of the transfer process. If Congress intended the Section 508 arbitrator to resolve matters that are historically subject to collective bargaining, it would not have established a board scheme in Sections 509 and 510. Thus, the Court concludes that under the statutory framework enacted by Congress, a Section 508 arbitration proceeding is not the proper stage for a change in craft and class determinations. Current collective bargaining agreements must be relied upon until after the implementing agreement is finalized. As Conrail and the unions correctly pointed out, and as NJT reluctantly concedes, such changes may indeed occur later on in the process during the Section 510 proceedings.

*New Jersey Transit Rail Operations* v. *International Brotherhood of Boilermakers,* 550 F. Supp. 1327, 1331 (Sp. Ct. RRRA 1982). More recently that court has specified that "a §501 agreement may modify the seniority provisions of a §508 implementing agreement." *Massaro, et al.* v. *Brotherhood of Locomotive Engineers,* 594 F. Supp. 762 (Sp. Ct. RRRA, 1984). The determination of the Special Court that the parties are permitted to negotiate a §510 agreement which modifies an implementing agreement is not subject to challenge here, as that court has been given original and exclusive jurisdiction over cases involving the interpretation of the Act. *See Massaro, supra* at 766.

Plaintiffs responded to defendants' motion by filing a cross-motion for summary judgment. The moving papers

are devoid of citations to case law in support of the motion, or in opposition to the defendants' motion. At argument counsel referred the court to the case of *Board of Regents of State Colleges, et al* v. *Roth,* 408 U.S. 564 (1972), for the proposition that plaintiffs have a constitutionally protected property interest in their seniority rights. *Roth* is inapposit. We are faced here with a claim for breach of the duty of fair representation, not a claim for deprivation of a constitutional right through state action.

## CONCLUSION

There is absolutely nothing in the record before this court to support a claim that the action of the Union and the Locals was "arbitrary, discriminatory, or in bad faith", *Vaca, supra,* or that the defendants acted with a bad motive, *Medlin, supra.* It is doubtful that plaintiffs could establish breach of the collective bargaining agreement, but the court need not address this question. Under the two-part test outlined in *Vaca* v. *Sipes, supra,* the absence of *either* factor would require entry of judgment in favor of defendants.

"[T]here is no issue more difficult for a union to resolve to the satisfaction of all its members that that of work seniority following a merger of operation." *Masullo* v. *General Motors Corp.,* 393 F. Supp. 188, 196 (D. N.J. 1975). The defendants' failure to satisfy plaintiffs, however, does not rise to a breach of the duty of fair representation absent a showing of arbitrariness, discrimination, or bad faith. Those factors are totally absent from this case.

*Appendix E*

Accordingly, plaintiffs' motion for summary judgment will be denied, and the motion of defendants will be granted.

Hon. Frederick B. Lacey
United States District Judge

Dated: August 20, 1985